## INDEX



### Table of Cases Cited

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

## No. 563

FIELDING B. BARLOW, PETITIONER,

vs.

FEDERAL LAND BANK OF BERKELEY,

RESPONDENT.

**BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

### QUESTIONS PRESENTED

In support of his petition for writ of certiorari, the petitioner makes two contentions, namely:

(1) The order of the District Court and the opinions and the judgments of the Circuit Court of Appeals are contrary to and in conflict with Section 75(n) of the Bankruptcy Act and the law laid down by this Court in certain cases (Pet. pp. 4, 5).

(2) His first proceeding under Section 75(s) of the Bankruptcy Act was not carried through as directed by the statutes as construed by this Court (Pet. pp. 6, 7).

Better continuity will result from a consideration of the two contentions in reverse order.

## ARGUMENT

### I

**In Petitioner's prior proceedings he procured the full measure of relief contemplated by the Congress.**

The petitioner's second contention is embraced within his following question and statement:

> "Does a prior abortive proceeding which has not been carried through as directed by the statute construed in John Hancock Mutual Life Insurance Company v. Bartels, supra, bar the maintenance of a new proceeding?" (Pet. pp. 6, 7)

> "Had the bank not prevailed upon the court to abandon the property in the midst of the administration, the proceedings could have been closed in harmony with the statute. The court having granted the motion to abandon the property, the jurisdiction was terminated. There had been no 'full measure of relief,' as contemplated by the statute." (Pet. p. 9)

On August 9, 1941, the District Court made an order in petitioner's first proceeding, No. 14935, which read in part as follows:

> "It is further Ordered that a reasonable time for said bankrupt to redeem said real property after said reappraisal be and the same is hereby fixed at the period of forty days from and after the date of the filing with the Clerk of this court of the said reappraisal, but that said time for such redemption shall expire at the end of said period."

The petitioner failed to redeem under the provisions of

Section 75(s) (3) within the reasonable time fixed by the court for such redemption.

On December 2, 1942, *more than a year after the expiration of the time fixed by the court for a redemption by petitioner under Section* 75(s) (3), the court made an order, based upon the report of the duly appointed, qualified and acting trustee, which read in part as follows:

> "It further appearing to the court from said report of said trustee and the said reappraisal of the said property on file herein, and the court finds, that there is no equity or value in or to said real property, which is hereinafter described, which will become or can be made available to said bankrupt or any of the general creditors of said bankrupt, and that the administration of said property herein would and will be burdensome to said estate; and, . . .
>
> "It is further Ordered that the real property of the said estate hereinafter described be and the same is hereby abandoned to The Federal Land Bank of Berkeley, being the holder of mortgage liens thereon, as burdensome to said estate, and all jurisdiction of this court in this proceeding or otherwise over said real property and the whole thereof is hereby fully relinquished and terminated."

The petitioner's contention that the abandonment by the trustee, following the bankrupt's failure to redeem at the reappraised value within the reasonable time fixed by the court, was "in the midst of administration," not "in harmony with the statute," and resulted in a failure to afford the bankrupt the "full measure of relief" intended by the Congress, is wholly unsupported by the facts and by the law. In *Wright* vs. *Union Central Life Insurance Company*, 61 S. Ct. 196,

311 U. S. 273, this Court made it clear that the maximum and final *right* of a bankrupt under Subsection (s) (3) is to redeem at the reappraised value within a reasonable time fixed by the court. If he fails to do this, the estate may be finally administered as a voluntary bankruptcy case, and the court may "order the property sold or otherwise disposed of as provided for in this Act." Abandonment of encumbered property as burdensome to the estate comes within the purview of "otherwise disposed of." It was so held by the Circuit Court of Appeals, Tenth Circuit, in *Federal Land Bank of Berkeley* vs. *Nalder and Sparks*, 116 F. (2) 1004, the court saying:

> "We conclude that by the phrase 'order the property sold or otherwise disposed of as provided for in this Act' Congress intended to direct a sale pursuant to the provisions of Section 70, sub. b, supra, or an abandonment by the trustee of the property as burdensome."

The court then stated the fact that a bankrupt has the right to have the property reappraised and to redeem it within a reasonable time fixed by the court, and then said:

> "If the debtor fails to avail himself of that right, the trial court should then determine whether there is a reasonable probability of realizing from the sale of the property any surplus over the encumbrances for the benefit of the general creditors or the bankrupt. . . . In the event it finds there is not such a probability, *it should order the property abandoned by the trustee as burdensome.*"*

Upon petition for writ of certiorari by Nalder, this Court denied certiorari on May 26, 1941, 61 S. Ct. 1095, 313 U.S.

* Emphasis added to all quotations throughout brief.

578. There are many cases holding that it is the right or duty of a trustee to abandon burdensome property. One of the more recent cases is *Logan* vs. *Stanolind Oil & Gas Co.*, 92 F. (2) 28, cert. denied 58 S. Ct. 409, 302 U.S. 763; 58 S. Ct. 522; 303 U.S. 636.

Since the alternative to abandonment would have been a sale by the trustee, from which there would have been *no* right of redemption, the petitioner's rights, far from having been *prejudiced* by the abandonment, were greatly *favored* thereby. Following the abandonment it was incumbent upon the respondent to institute a foreclosure action in the Utah State Court. Under the Utah Statutes, there is a six months' period following a foreclosure sale in which the mortgagor may redeem the property. Since it has been nearly four years since the District Court made the order abandoning the property as burdensome, it follows that by reason of such order, instead of a sale by the trustee, the bankrupt has retained possession for several years longer than he might have retained possession had the trustee sold the property. Furthermore, during such period, the bankrupt has retained all income from the property and paid nothing whatsoever to respondent.

## II

**Admittedly Section 75(n) includes, among the property rights over which the bankruptcy court shall take jurisdiction, the right of redemption. Such a right is not separable from the property, and the Congress did not intend that any property should be fully administered more than once.**

The petitioner's other contention is that since it is provided in Section 75(n) of the Bankruptcy Act that the filing

of a petition shall immediately subject the farmer and all his property to the exclusive jurisdiction of the bankruptcy court, including "the right or the equity of redemption where the period had not or has not expired," the bankruptcy court should have taken jurisdiction over his right of redemption in his second proceeding, No. 16134.

The petitioner makes much of the fact that the right of redemption is specifically mentioned in Subsection (n). He overlooks the fact that said subsection provides that the filing of a petition shall immediately subject "the farmer and *all his property*" to the exclusive jurisdiction of the court. The petitioner's contention that the bankruptcy court should have taken jurisdiction over his right of redemption is as fallacious as would be a contention that, on the day after the order abandoning the subject property as burdensome to the estate, he had the absolute right, by reason of Subsection (n), immediately to file another petition and that it would then have been incumbent upon the court again to take jurisdiction over the subject property because Subsection (n) says that the filing of a petition shall immediately subject the farmer and *"all his property,"* to the exclusive jurisdiction of the court. Not only would such a contention be as fully supported by the provisions of Subsection (n) as is the petitioner's present contention, but *if applicable,* Subsection (n) would require the bankruptcy court to take jurisdiction again and again over the same property so long as the debtor was able to file a petition after the termination of the bankruptcy court's jurisdiction but *before a mortgagee could complete a foreclosure action.* Since it takes practically no time whatsoever to file a petition, but takes approximately a year to complete a foreclosure

action, the mortgagee would be poorly equipped for a race with the mortgagor, and it would follow, according to the petitioner's contention, that the Congress intended that the bankruptcy court should retain permanent jurisdiction over a mortgagee's security, through successive petitions.

Subsection (n) also provides that the bankruptcy court shall take exclusive jurisdiction "where deed had not been delivered, at the time of filing petition." According to the petitioner's contention, had the trustee sold the property, the petitioner could have again procured the full benefits of Section 75(a-s) had he been able to file a second petition between the date of the sale and the delivery of the trustee's deed. Such a contention would be so absurd that it would be difficult to believe that it could be made for any other purpose than to delay the purchaser at the mortgage foreclosure sale in procuring possession of the subject property.

It must be borne in mind that respondent, the District Court, and the Circuit Court of Appeals have at all times recognized the petitioner's *full right* to redeem the property from the mortgage foreclosure sale, in accordance with the Statutes of Utah.

The several cases cited by the petitioner are no authority whatsoever for his position. The bankrupts in said cases had not procured the full measure of relief in any former proceeding affecting the same property, the same debt, and the same secured creditor, as in the instant case. That is, in none of the cases had the property been reappraised and a reasonable time fixed within which the bankrupt might have redeemed the property by paying the reappraised value. In fact, in none of the cases had the debtor procured *any* of the

benefits of Subsection (s). The provisions of Section 75(n) authorizing the bankruptcy court to take jurisdiction over a debtor's right of redemption is too clear to admit of any contrary opinion. We know that the court has such a right in an *initial* proceeding. The petitioner quotes from *Wragg* vs. *Federal Land Bank of New Orleans,* 317 U.S. 325, 63 S. Ct. 273, in part, as follows:

> "We find no intimation in the language and purposes of the Act that an *unsuccessful earlier proceeding* would preclude a new petition . . ." (Pet. p. 10)

The question was whether under the state law the interest of a mortgagor, following a mortgage foreclosure sale, constituted a right or equity of redemption. This Court held that it did, and, accordingly, the debtor's "unsuccessful earlier proceeding," which had been dismissed before adjudication under Subsection (s), was held not to be a bar to further proceedings thereunder.

The petitioner quotes from *Wright* vs. *Logan*, 315 U.S. 139, 62 S. Ct. 508. A part of the quotation reads as follows:

> "It is nevertheless appropriate to point out at this time that whatever right of redemption the petitioners had when they *first* applied for adjudication under 75 continued to be a part of their assets, subject to administration by the bankruptcy court." (Pet. pp. 6 and 7, 8)

It will be noted that this Court specifically limited its statement to the right of redemption the petitioners had when they *"first"* applied for adjudication. Their first amended petition under Subsection (s) had been dismissed, without any proceedings thereunder.

Petitioner also quotes from *Layton* vs. *Thayne*, 133 F. (2) 287, wherein the Circuit Court of Appeals, Tenth Circuit, said:

> "This right of redemption is within the protective provisions of the Act and may be protected in a proceeding instituted *by one entitled to the benefits of the Act.*" (Pet. pp. 6 and 8)

This is in no way contrary to the decision of the Circuit Court in the instant case since it was here held that the bankrupt was not "one entitled to the benefits of the Act." The petitioner also says that in the *Layton* case the debtor had been in a former proceeding under Section 75, and he quotes from the opinion. The quotation clearly shows that the court, in referring to "his first proceeding," meant the petition under Subsections (a-r), as later in the quotation the court referred to "this proceeding" as being the only proceeding the bankrupt had instituted. (Pet. pp. 8, 9.)

The bankrupt appears to rely quite strongly on *John Hancock Mutual Life Insurance Company* vs. *Bartels*, 308 U.S. 18, 60 S. Ct. 221. In that case the debtor's Section 75 (a-r) proceeding had been *dismissed*, and the debtor had never had the opportunity to redeem the property by paying the reappraised value thereof, nor had he procured *any* relief under Section 75(s). There is not even a remote similarity between the facts considered by this Court in the *Bartels* case and those of the instant case.

The petitioner says:

> "Even though the value of the property was much less than the debt, still the debtor had a right to try

> to work out a settlement and, if need be, through a reappraisement, to redeem for a sum less than the amount of the indebtedness." (Pet. p. 12)

Should the bankruptcy court take jurisdiction over petitioner's right of redemption, the ultimate relief, to which petitioner evidently thinks himself entitled, would be the appraisal and reappraisal of the *farm*, and the right to reacquire the *farm* by paying into court the appraised or reappraised value thereof. The petitioner does not have the legal right *again* to have the *farm* valued by the bankruptcy court, *again* to have a reasonable time fixed in which to redeem the *farm*, and *again* to have the *same right* he had in his former proceeding to redeem *the same property*. Nevertheless, should the court take jurisdiction of the right of redemption, the petitioner would be in a position to procure as effective relief as though he still owned the fee title. This clearly illustrates the fallacy in the argument that the right of redemption is a different and separate right. The fact is that the right of redemption is simply a lesser or residuary right or interest in the subject property, and that in fully administering the fee title the lesser rights and interests have also been fully administered.

It is respectfully submitted that the decision of the Circuit Court of Appeals is entirely correct and that certiorari should be denied.

Respectfully submitted,

RICHARD W. YOUNG,
*(Berkeley, California)*
*Counsel for Respondent.*